KETUA SETIAUSAHA KEMENTERIAN PERTAHANAN MALAYSIA & ANOR v. BUMITA SDN BHD

COURT OF APPEAL, PUTRAJAYA
LIM YEE LAN JCA
BADARIAH SAHAMID JCA
HARMINDAR SINGH DHALIWAL JCA
[CIVIL APPEAL NO: R-01(NCVC)(W)-281-08-2015]
20 DECEMBER 2017

CONTRACT: *Agreement – Breach – Breach of conditions of contract – Contract revoked – Whether revocation of contract lawful – Whether there were losses incurred arising from revocation of contract – Whether there were damages – Whether damages proven*

In response to an invitation by the appellants ('the defendants') for a project, the respondent ('the plaintiff') submitted its tender, which included design and price for RM62 million. The parties negotiated and the contract price was reduced to RM60.5 million. Acting for the defendants, the Ministry of Defence ('MINDEF') issued a letter of acceptance ('the LOA') to the plaintiff. Amongst the conditions stated in the LOA were (i) the contract price was RM60.5 million; (ii) the contract period was 24 months; and (iii) the date of possession of the site was 3 June 2008 and the date of completion of the project was on 2 June 2010. The first defendant delivered possession of the site to the plaintiff on 3 June 2008 in order that preliminary works could be commenced according to schedule. By a letter dated 23 July 2008, MINDEF revoked the LOA on the grounds that the plaintiff failed (i) to sign and return the LOA within seven days from date of the LOA, as required under para. 8 of the LOA; and (ii) to start work within two weeks from the date of possession of the site on 2 June 2008, as stipulated by para. 6 of the LOA. This prompted the plaintiff to commence an action against the defendants, at the High Court, for (i) a declaration that the revocation of the LOA was unlawful; and (ii) damages for losses incurred in the commencement of preliminary works on project and future loss of profits. The Judicial Commissioner ('the JC') allowed the plaintiff's claim and awarded the plaintiff nominal damages of RM10,000 for losses in respect of preliminary works and future profit of RM1.2 million. Hence, the present appeal.

Held (allowing appeal with costs; setting aside decision of High Court)
Per Badariah Sahamid JCA delivering the judgment of the court:

(1) The defendants had issued the plaintiff two notices of reminder, on 26 June 2008 and 8 July 2008, to comply with para. 8 but to no avail. Therefore, the failure of the plaintiff to sign and return the signed LOA to the defendants within seven days, as required by para. 8 of the LOA, was a breach of the LOA which entitled the defendants to revoke the

LOA. Furthermore, the plaintiff also failed to commence works on the project within two weeks of delivery of the site on 3 June 2008. This failure was a breach of para. 6. (paras 28, 29 & 30)

(2) The terms stipulated in the LOA, in particular paras. 4, 6 and 8, are in the nature of conditions precedent, the non-fulfilment of which will negate the existence of binding contract between the parties. The defendants were entitled to revoke the LOA. It was expressly stated in para. 2 of the LOA that pending the execution of a formal agreement between the parties, the terms of the LOA would nevertheless be binding. (paras 31 & 32)

(3) A plaintiff who brings an action to recover damages must discharge the burden of proving both the fact of damage and amount of damage. However, in respect of the plaintiff's claim for damages, there was no credible evidence adduced to support the plaintiff's contention that it had incurred expenses in undertaking earthworks and survey works which the plaintiff submitted were 'preliminary works' on the project. The JC's award of RM10,000 to the plaintiff as nominal damages for preliminary works on the project was clearly unsustainable. The award of RM1.2 million for future loss of profits to the plaintiff was also unsustainable. Since the plaintiff failed to adduce evidence that preliminary works had even commenced, there was no basis for the assertion of a future loss of profits. It was not sufficient to merely submit a projected loss of profits. (paras 35, 39 & 40)

Bahasa Malaysia *Headnotes*

Membalas pelawaan perayu-perayu ('defendan-defendan'), responden ('plaintif') mengemukakan tendernya, yang termasuk rekaan dan harga berjumlah RM62 juta. Pihak-pihak berunding dan harga kontrak dikurangkan menjadi RM60.5 juta. Bertindak bagi pihak defendan-defendan, Kementerian Pertahanan ('MINDEF') mengeluarkan surat penerimaan ('SP') kepada plaintif. Antara syarat-syarat yang dinyatakan dalam SP adalah (i) harga kontrak ialah RM60.5 juta; (ii) tempoh kontrak ialah 24 bulan; dan (iii) tarikh milikan tapak jatuh pada 3 Jun 2008 dan tarikh penyempurnaan projek jatuh pada 2 Jun 2010. Defendan pertama menyerahkan milikan tapak kepada plaintif pada 3 Jun 2008 agar kerja-kerja awalan boleh dimulakan seperti dijadualkan. Berdasarkan sepucuk surat bertarikh 23 Julai 2008, MINDEF membatalkan SP atas alasan plaintif gagal (i) menandatangani dan menyerahkan SP dalam tujuh hari dari tarikh SP, seperti yang dikehendaki perenggan 8 SP; dan (ii) memulakan kerja dua minggu dari tarikh milikan tapak pada 2 Jun 2008, seperti yang dinyatakan dalam perenggan 6 SP. Ini menyebabkan plaintif memulakan tindakan terhadap defendan-defendan, di Mahkamah Tinggi, untuk (i) satu pengisytiharan bahawa pembatalan SP tidak sah; dan (ii) ganti rugi kerugian yang dialami berikutan pemulaan kerja-kerja awalan projek dan kehilangan keuntungan masa hadapan.

Pesuruhjaya Kehakiman ('PK') membenarkan tuntutan plaintif dan mengawardkan plaintif ganti rugi nominal bagi kerugian kerja-kerja awalan dan keuntungan masa hadapan sebanyak RM1.2 juta. Maka timbul rayuan ini.

Diputuskan (membenarkan rayuan dengan kos; mengetepikan keputusan Mahkamah Tinggi)
Oleh Badariah Sahamid HMR menyampaikan penghakiman mahkamah:

(1) Defendan telah mengeluarkan dua notis peringatan kepada plaintif, pada 26 Jun 2008 dan 8 Julai 2008, agar mematuhi perenggan 8 tetapi tidak berjaya. Oleh itu, kegagalan plaintif menandatangani dan memulangkan SP yang ditandatangani kepada defendan dalam tujuh hari, seperti yang dikehendaki oleh perenggan 8 SP, adalah satu pelanggaran SP yang memberi hak kepada defendan untuk membatalkan SP. Tambahan lagi, plaintif juga gagal memulakan kerja-kerja projek dalam dua minggu dari penyerahan tapak pada 3 Jun 2008. Kegagalan ini satu pelanggaran perenggan 6.

(2) Terma-terma yang dinyatakan dalam SP, khususnya perenggan 4, 6 dan 8, bersifat prasyarat, yang kegagalan memenuhinya akan menidakkan kewujudan kontrak mengikat antara pihak-pihak. Defendan-defendan berhak membatalkan SP. Ini dinyatakan dengan jelas dalam perenggan 2 SP bahawa sementara menanti pelaksanaan perjanjian rasmi antara pihak-pihak, terma-terma SP mengikat.

(3) Seorang plaintif yang memulakan tindakan untuk mendapatkan semula ganti rugi mestilah melepaskan beban membuktikan fakta dan jumlah kerugian. Walau bagaimanapun, berkenaan tuntutan ganti rugi plaintif, tiada keterangan yang boleh dipercayai yang dikemukakan untuk menyokong hujahan plaintif bahawa plaintif telah mengeluarkan perbelanjaan dalam menjalankan kerja-kerja tanah dan survei yang dinyatakan sebagai kerja-kerja awalan projek. Award PK sebanyak RM10,000 kepada plaintif sebagai ganti rugi nominal kerja-kerja awalan projek jelas tidak wajar. Award RM1.2 juta untuk kehilangan keuntungan masa hadapan kepada plaintif juga tidak wajar. Oleh kerana plaintif gagal mengemukakan keterangan bahawa kerja-kerja awalan telah dimulakan, tiada asas untuk hujahan kehilangan kerugian masa hadapan. Tidak cukup sekadar mengemukakan ramalan kehilangan keuntungan.

Case(s) referred to:
Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors And Another Case [1995] 3 CLJ 639 CA ***(refd)***
Bekalan Sains P & C Sdn Bhd v. Bank Bumiputra Malaysia Bhd [2011] 1 LNS 232 CA ***(refd)***
Chase Perdana Bhd v. Md Afendi Hamdan [2009] 6 CLJ 501 FC ***(refd)***
Delpuri-Harl Corp JV Sdn Bhd v. Perbadanan Kemajuan Negeri Selangor [2014] 1 LNS 1075 CA ***(refd)***
Malayan Flour Mills Bhd v. Saw Eng Chee & Anor [2001] 3 CLJ 18 CA ***(refd)***

A *Prai Power Sdn Bhd v. Malayawata Steel Bhd [2013] 1 LNS 1530 CA* ***(refd)***
Soon Peng Yam & Anor v. Bank of Tokyo-Mitsubishi (Malaysia) Bhd [2004] 1 CLJ 532 CA ***(refd)***
Wong Swee Chin v. PP [1980] 1 LNS 138 FC ***(refd)***

Legislation referred to:
B Contracts Act 1950, s. 5
Evidence Act 1950, ss. 101, 103

For the appellant - Ahmad Terrirudin Mohd Salleh & Cynthia Noor Haizean Sulaiman; SFCs
For the respondent - Zamri Ibrahim; M/s Zamri Ibrahim & Co

C *[Editor's note: For the High Court judgment, please see Bumita Sdn Bhd Lwn. Ketua Setiausaha Kementerian Pertahanan Malaysia & Satu Lagi [2015] 1 LNS 745 (overruled).]*

Reported by Najib Tamby

D

JUDGMENT

Badariah Sahamid JCA:

Introduction

E For ease of reference, parties will be referred to as they were in proceedings before the High Court.

[1] This is an appeal against the decision of the learned Judicial Commissioner (JC) delivered on 26 June 2015 which allowed the plaintiff's claim against the defendants in the following terms:

F (i) A declaration that a revocation of a letter of acceptance (LOA) by the first defendant was unlawful;

(ii) An award of RM10,000 in nominal damages as compensation for preliminary works;

G (iii) An award of RM1.2 million for future loss of profits, calculated at 20% of the contract price of RM60.5 million.

Background Facts

[2] The plaintiff was invited by the defendants to participate in a direct negotiation tender in a project known as, "Projek Pembangunan Semula Kem Rejimen Sempadan Dan Skuadron Medan Jurutera (Kem Oran) Chuping, Oran Perlis" ("the said project").

[3] In response, the plaintiff submitted its tender which included design and price for RM62 million. After negotiations between the parties, the I contract price was agreed to be reduced to RM60.5 million.

[4] Subsequently, the Ministry of Defence ("MINDEF"), acting for the defendants issued a letter of acceptance (LOA) dated 22 May 2008 to the plaintiff.

The letter reads as follows:

> Dengan ini adalah diberitahu bahawa Tender tuan bagi kerja-kerja tersebut diatas berharga RM60,500,000 (Ringgit Malaysia: ENAM PULUH JUTA LIMA RATUS RIBU SAHAJA) telah dipersetujui, tertakluk kepada had, syarat dan perjanjian dalam Dokumen Tender yang menjadi asas Tender ini dan juga kepada surat ini.
>
> 2. Tuan akan dikehendaki melaksanakan Perjanjian Kontrak yang formal dalam sedikit masa lagi. Bagaimanapun, sehinggalah Perjanjian Kontrak yang formal itu dilaksanakan, Tender Tuan berserta Surat Setuju Terima ini akan menjadi kontrak yang sah mengikat di antara tuan dan Kerajaan.
>
> 3. Tuan dikehendaki menyatakan pilihan kaedah Bon Perlaksanaan samaada:
>
> (i) Jaminan Bank/Bank Islam/Bank Pembangunan Malaysia Berhad (BPMB); atau
>
> (ii) Jaminan Syarikat Kewangan; atau
>
> (iii) Jaminan Insurans/Takaful atau
>
> (iv) Wang Jaminan Pelaksanaan yang dikenakan potongan sebanyak sepuluh peratus (10%) daripada setiap bayaran interim sehingga mencapai jumlah lima peratus (5%) Jumlah Harga Kontrak.
>
> 4. Tarikh milik tapak bina, seperti yang disebutkan dalam Syarat-syarat Kontrak, ialah pada 3 Jun 2008. Walau bagaimanapun, tuan hanya boleh memulakan kerja setelah tuan menyerahkan kepada Pegawai Penguasa perkara-perkara berikut:
>
> (a) Polisi Insurans Tanggungan Awam (iaitu insurans terhadap bencana kepada orang-orang dan kerosakan kepada harta nilai insurans tidak kurang daripada RM2,000,000.00.
>
> (b) Polisi Insurans Kerja RM60,500.000.
>
> (c) Nombor-nombor pendaftaran dibawah Skim Keselamatan Sosial Pekerja (PERKESO).

[5] Amongst the conditions stated in the LOA are these: the contract price was RM60.5 million; the contract period was 24 months; the date of possession of the site was 3 June 2008 and the date of completion of the said project was on 2 June 2010.

[6] The first defendant had delivered possession of the site to the plaintiff on 3 June 2008, in order that preliminary works could be commenced according to schedule.

[7] By a letter dated 23 July 2008, MINDEF had issued a letter to the plaintiff which revoked the LOA in the following terms:

> 2. Adalah dimaklumkan bahawa Kementerian ini memutuskan untuk membatalkan Surat Setuju Terima Tender (LOA) yang telah dikemukakan kepada Y. Bhg Dato' mengenai projek pembangunan di atas berdasarkan kepada fakta-fakta berikut:
>
> 2.1. Syarikat Y.Bhg. Dato' gagal mematuhi syarat untuk mendatangani dan mengembalikan Surat Setuju Terima (LOA) dalam tempoh tujuh (7) hari seperti yang dinyatakan pada para 8 kepada surat LOA berkenaan.
>
> 2.2. Syarikat Y.Bhg. Dato' gagal mematuhi syarat yang ditetapkan pada para 6 dalam surat LOA iaitu memulakan kerja dalam tempoh 2 minggu dari tarikh milik tapak yang telah dibuat pada 2 Jun 2008.

[8] In summary, the defendants had revoked the LOA for the following reasons:

(i) that the plaintiff had failed to sign and return the LOA within seven days from the date of the LOA, as required under para. 8 of the LOA, and

(ii) that the plaintiff had failed to start work within two weeks from the date of possession of the site on 2 June 2008, as stipulated by para. 6 of the LOA.

[9] The plaintiff brought an action against the defendants for a declaration that the revocation of the LOA was unlawful and damages for losses incurred in commencement of preliminary works on the said project as well as future loss of profits.

Issues Before The High Court

[10] The issues before the High Court may be summarised as follows:

(a) Whether the revocation of the LOA by the first defendant was valid?

(b) If the answer to the above is in the affirmative, whether the plaintiff is entitled to the compensation sought?

Decision Of The High Court

[11] The learned JC had allowed the plaintiff's claim for a declaration that the defendant's revocation of the LOA was invalid and awarded the plaintiff nominal damages of RM10,000 for losses in respect of preliminary works as well as loss of future profit of RM1.2 million, which was calculated on the basis of 20% of the contract price of RM60.5 million.

[12] The grounds relied on by the learned JC are as follows:

(i) The failure of the plaintiff to comply with para. 8 of the LOA which requires the plaintiff to sign and return the signed copy of the LOA to the defendant is not a ground for revocation of the LOA by the defendant. There is no express stipulation that a failure to comply with the terms of the LOA would entitle the defendant to revoke the LOA.

(ii) The plaintiff had already commenced preliminary works on the project site, in that earthworks and surveys had been conducted by the plaintiff. Since para. 6 of the LOA does not define what amounts to "preliminary works", the abovementioned works by the plaintiff can be construed as "preliminary works" in accordance with para. 6 of the LOA.

(iii) In the alternative, even if the plaintiff had failed to commence preliminary works according to the stipulated time, the defendants had by their subsequent conduct during the course of coordination meetings between the parties on 3 June 2008 and 13 June 2008, waived the requirement that the works on the site be commenced two weeks from the date possession of site was delivered to the plaintiff.

(iv) In the absence of a written contract between the parties, the terms of the contract including cl. 51(b)(i) cannot be used by the defendants to revoke the LOA. Thus the defendants' termination of the LOA was unlawful.

(v) Since the LOA was unlawfully terminated, the plaintiff was entitled to nominal damages of RM30,000 for losses incurred in undertaking "preliminary works" on the said project as well as RM1.2 million for future loss of profits, calculated as 20% of the contract price of RM60.5 million.

Plaintiffs/Respondents' Submissions

[13] The LOA was an acceptance by the defendants to the offer made by the plaintiff through a direct negotiation tender. Thus there was already a subsisting binding contract between the parties that is legally enforceable. This is clearly stated in the said LOA as follows:

> Dengan ini adalah diberitahu bahawa Tender tuan bagi kerja-kerja tersebut diatas berharga RM60,500,000 (Ringgit Malaysia: Enam Puluh Juta Lima Ratus Ribu Sahaja) telah dipersetujui, tertakluk kepada had, syarat dan perjanjian dalam Dokumen Tender yang menjadi asas Tender ini dan juga kepada surat ini.
>
> Tuan akan dikehendaki melaksanakan Perjanjian Kontrak yang formal dalam sedikit masa lagi. Bagaimanapun, sehinggalah Perjanjian Kontrak yang formal dilaksanakan, Tender Tuan berserta Surat Setuju Terima Tender ini akan menjadi kontrak yang sah mengikat diantara tuan dan Kerajaan.

[14] Since the defendants had accepted the offer of the plaintiff and the acceptance had already been communicated to the plaintiff, the defendants cannot unilaterally revoke the acceptance.

In support of the above, reference is made to s. 5 of the Contracts Act 1950 which provides as follows:

> 5(1) A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterward.
>
> (2) An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterward.

Thus the revocation of the LOA by the defendants by a letter to the plaintiff dated 23 July 2008 was invalid.

[15] The defendants' reason for revoking the acceptance *viz*, the failure of the plaintiff to comply with para. 8 of the LOA to sign and return the signed document within seven days of the date of the letter, is unsustainable. The stipulation in para. 8 abovementioned was for the purpose of acknowledgment of receipt of the LOA. It was not a pre-condition to the establishment of a contract between the parties.

[16] The said project was executed through a direct negotiation tender where matters were discussed and finalised prior to the issuance of the said LOA. Acceptance was made by MINDEF with the issuance of the said LOA to the plaintiff dated 22 June 2008. The said acceptance established a binding contract between the plaintiff and the defendants.

[17] The second reason given by the defendants for revoking the acceptance is because the plaintiff had failed to commence works on the site within two weeks from the date of the possession of the site on 2 June 2008, as required by para. 6 of the said LOA which provides as follows:

> Kegagalan tuan memulakan kerja dalam tempoh dua (2) minggu dari tarikh milik tapak akan mengakibatkan pengambilan kerja tuan di bawah kontrak ditamatkan sejajar dengan Fasal 51(b)(i) Syarat-Syarat Kontrak.

According to the abovementioned clause, the requirement to commence work was in relation to the determination of the plaintiff's employment under cl. 51(b)(i) of the Syarat-Syarat Kontrak but not as a reason to revoke acceptance of the said LOA.

[18] In any event, there is evidence that the plaintiff had commenced works on the site within two weeks of possession of the site.

(i) PW1 confirmed that the plaintiff had started site survey works on 22 May 2008 which was completed on 8 June 2008. Site clearing and ground levelling works started on 10 June 2008 and were completed on 10 July 2008.

(ii) PW1 and PW2 had attended the coordination meeting on 13 June 2008 and the Chairman had been informed of the commencement of works. The Chairman had instructed that works be continued and documents to be submitted earlier so that the said project would not be delayed.

(iii) The plaintiff had submitted survey plans and monthly progress report No. 1 as exhibits to support the plaintiff's contention that the plaintiff had commenced works on the site.

[19] The evidence of PW1, PW2 and PW3 were not challenged or refuted by the defendants, thus must be accepted as true. (Refer to *Wong Swee Chin v. PP* [1980] 1 LNS 138; [1981] 1 MLJ 212; *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Case* [1995] 3 CLJ 639; [1995] 2 MLJ 770; *Soon Peng Yam & Anor v. Bank of Tokyo-Mitsubishi (Malaysia) Bhd* [2004] 1 CLJ 532; [2004] 2 MLJ 31.)

[20] The subsequent conduct of the defendants in delivering possession of the site to the plaintiff on 3 June 2008, the attendance of the defendants' representative at the coordination meeting on 13 June 2008 and instruction to the plaintiff to continue with the works on the site in spite of the plaintiff's failure to sign and return the said LOA within seven days was a clear waiver of the precondition, if any for the plaintiff to sign and return the said LOA within the stipulated time. The defendants are therefore estopped from an insistence on strict compliance of the preconditions of the said LOA, in particular, para. 8.

Grounds Of Appeal

[21] The defendants' grounds of appeal may be summarised as follows. The learned JC had erred in granting a declaration to the plaintiff that the revocation of the LOA was unlawful when the evidence was that the plaintiff had failed to comply with the express terms of the LOA that mandated the plaintiff to sign and return the said LOA within seven days of the date of the LOA as required under para. 8 of the said LOA.

[22] The learned JC had erred in his finding that in the absence of a written contract, the defendants cannot use cl. 51(b)(i) of the Syarat-syarat Kontrak to revoke the LOA.

[23] The learned JC had erred in his finding that the plaintiff had commenced preliminary works on the said project and awarding nominal damages of RM10,000 for losses incurred on the said preliminary works when there was no evidence of invoices or payment for preliminary works adduced by the plaintiff.

[24] The learned JC had erred in awarding compensation of RM1.2 million for future loss of profits when the plaintiff had failed to prove such losses.

A **Decision Of This Court**

[25] After careful consideration of learned counsel's oral and written submissions as well as a perusal of the appeal records, we are of the unanimous view that there are merits in this appeal. Thus, we allow this appeal with costs and set aside the decision of the learned JC. The reasons for our decision are set out below.

[26] It is not disputed that the LOA upon which the plaintiff places reliance is governed by the express terms and conditions of the LOA. This is stated in para. 2 which states (in Bahasa Melayu) as follows:

> 2. Tuan akan dikehendaki melaksanakan Perjanjian Kontrak yang formal dalam sedikit masa lagi. Bagaimanapun, sehinggalah Perjanjian Kontrak yang formal dilaksanakan, Tender tuan beserta SST Tender ini akan menjadi kontrak yang sah yang mengikat diantara tuan dan Kerajaan.

It is clear from the above that pending the execution of a formal agreement, parties intend to nevertheless be bound by the terms of the LOA.

[27] In addition, para. 8 of the LOA provides as follows:

> Surat ini dihantar kepada tuan dalam dua (2) Salinan. Sila kembalikan Salinan asal, yang telah ditandatangani oleh tuan dan disaksikan dengan sempurna, di ruang yang berkenaan, ke pejabat ini dalam tempoh tujuh (7) hari dari tarikh surat ini.

[28] The defendants had issued the plaintiff two notices of reminder - on 26 June 2008 and 8 July 2008 to comply with para. 8 abovementioned but to no avail. Thus, the failure of the plaintiff to sign and return the signed LOA to the defendants within seven days as required by para. 8 of the LOA is a breach of the LOA which entitles the defendants to revoke the LOA.

[29] In addition, the plaintiff had also failed to commence works on the said project within two weeks of delivery of the site on 3 June 2008. Paragraph 4 of the LOA states as follows:

> 4. Tarikh milik tapak bina, seperti yang disebut dalam Syarat-Syarat Kontrak, ialah pada 3 Jun 2008. Walaubagaimanapun, tuan hanya boleh memulakan kerja setelah tuan menyerahkan kepada Pegawai Penguasa perkara-perkara berikut:
>
> (a) Polisi Insurans Tanggunan Awam (iaitu insurans terhadap bencana kepada orang-orang dan kerosakan kepada harta) nilai insurans tidak kurang daripada RM2,000,000.00.
>
> (b) Polisi insurans Kerja RM60,5000.00
>
> (a) Nombor-nombor pendaftaran dibawah Skim Keselamatan Sosial Pekerja (PERKESO).

[30] The failure to commence work at the appointed date is a breach of para. 6 of the LOA which states as follows:

> Kegagalan tuan memulakan kerja dalam tempoh dua (2) minggu dari tarikh milik tapak akan mengaakibatkan pengambilan kerja tuan dibawah kontrak ditamatkan sejajar dengan Fasal 51(b)(i) Syarat-Syarat Kontrak.

[31] The terms stipulated in the LOA, in particular in paras. 4, 6 and 8 of the LOA are in the nature of conditions precedent, the non-fulfilment of which will negate the existence of a binding contract between the parties. Thus, the defendants were entitled to revoke the LOA. (Refer to *Malayan Flour Mills Bhd v. Saw Eng Chee & Anor* [2001] 3 CLJ 18; [2001] 3 MLJ 69; *Chase Perdana Bhd v. Md Afendi Hamdan* [2009] 6 CLJ 501; [2009] 6 MLJ 783).

[32] We note that it was expressly stated in para. 2 of the LOA that pending the execution of a formal agreement between the parties, the terms of the LOA would nevertheless be binding.

[33] We are therefore of the view that the learned JC had erred in his finding that the acceptance of the LOA by the plaintiff did not allow the defendants to terminate the LOA. In addition, we are of the opinion that the signing and return of the LOA as stipulated by para. 8 of the LOA was essential to conclude a binding contract.

[34] In respect of the contention of the plaintiff that the subsequent conduct of the defendants during the course of the coordination meetings between the parties can be construed as a waiver for compliance of the conditions precedent in the LOA, we are of the view that since the issue of waiver was not pleaded in the plaintiff's claim, it cannot now be raised for our consideration.

[35] In respect of the plaintiff's claim for damages, we find no credible evidence adduced by the plaintiff to support the contention that the plaintiff had incurred expenses in undertaking earthworks and survey works which the plaintiff submits are "preliminary works" on the said project.

[36] SP1 in his evidence had admitted that there were no preliminary works undertaken on the site. There were no site diaries on the works and no information as to the number of workers on the project sites. The documents tendered by the plaintiff entitled, "Laporan Kemajuan Bulanan No 1 (Bagi Tempoh Hingga 13 Julai 2008) at pp. 100-104 of rekod rayuan jld. 2(1) were unsigned in the columns designated for preparation and verification of abovementioned report. Neither was a witness who had prepared the abovementioned report called to give evidence on the report. It is trite that the burden of proof lies on the plaintiff to prove its claim. (Refer to ss. 101 and 103 of the Evidence Act 1950)

[37] In addition, the survey plans were dated after the date of the revocation of the LOA and are clearly an "afterthought". There were no invoices or receipt of payments in respect of the alleged "preliminary works". What was adduced was merely a quotation for earthworks at the project site by Enrich Frontier Sdn Bhd dated 2 June 2008. (Refer to rekod rayuan jld. 2 (1) at p. 90)

[38] In any event, para. 4 of the LOA had stipulated that the plaintiff could only commence works on the site after obtaining and presenting specified insurance policies and registration numbers under the PERKESO workers social security scheme. It is not disputed that the plaintiff had not adduced any evidence that the abovementioned conditions had been complied with.

[39] It is trite and settled law that a plaintiff who brings an action to recover damages must discharge the burden of proving both the fact of damage and the amount of damage. (See *Delpuri-Harl Corp JV Sdn Bhd v. Perbadanan Kemajuan Negeri Selangor* [2014] 1 LNS 1075). Thus, the learned JC's award of RM10,000 to the plaintiff as nominal damages for preliminary works on the project is clearly unsustainable.

[40] The award of RM1.2 million for future loss of profits to the plaintiff is also unsustainable in law. The amount was derived by calculating 20% of the contract price of RM60.5 million as the loss of future profits. Since the plaintiff had failed to adduce evidence that preliminary works had even commenced, there is no basis for the assertion of a future loss of profits. It is not sufficient to merely submit a projected loss of profits. (Refer to *Bekalan Sains P & C Sdn Bhd v. Bank Bumiputra Malaysia Bhd* [2011] 1 LNS 232; [2011] 5 MLJ 1; *Prai Power Sdn Bhd v. Malayawata Steel Bhd* [2013] 1 LNS 1530).

[41] In conclusion, we find merits in this appeal. We therefore allow this appeal with costs of RM20,000 to the appellants. We set aside the decision of the learned JC both on liability as well as damages.